SCR.A/972/2005 1/8 JUDGMENT

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 972 and 973 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MADHUBHAI GANDABHAI PATEL - Applicant(s)

Versus

JOITARAM JIVIDAS PATEL & 1 - Respondent(s)

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Appearance :
MR SA BAQUI for Applicant(s) : 1,
MR DM AHUJA for Respondent(s) : 1,
MR.NITINCHANDRA DAVE for Respondent(s) : 1,
PUBLIC PROSECUTOR for Respondent(s) : 2,
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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 24/08/2005

ORAL JUDGMENT

1.Rule. Mr.Ahuja for the original complainant as well as Mr.Gohil, Ld.APP for the State waive notice of rule. The matter is finally heard today.

2. As common questions arise in these petitions, both the petitions are being considered simultaneously.

3. The petitioner has preferred the petition for challenging the order passed by the Ld.Magistrate and its confirmation thereof by the Ld.Sessions Judge whereby the application of the petitioner for examining the handwriting expert as witness of the petitioner is rejected and the same is confirmed by the Ld.Sessions Judge in the revisional proceedings.

4. Heard Mr.Baqui for the petitioner, Mr.Gohil, Ld.APP for the State and Mr.Ahuja for the respondent No.1-original complainant.

5. It has been submitted on behalf of the petitioner that after the evidence of the complainant was over at the stage of recording of FS, the application was made for forwarding cheque to the handwriting expert because the defense of the petitioner is that he has signed the blank cheque and the amount, name or date are filled up by the complainant. Mr.Baqui submitted that with a view to rebut the presumption under Negotiable Instruments Act the only mode available to the petitioner is to lead the evidence by examining the handwriting expert and before the handwriting expert is examined the cheque is required to be forwarded to the handwriting expert

and therefore the application is made. It has been submitted that if ultimately it is proved that blank signed cheque was given and the date, amount and the name are filled up by the complainant or there is any alteration in the cheque made it may not attract the liability under section 138 of Negotiable Instruments Act and therefore it has been submitted that the Ld.Magistrate ought to have allowed the application and ought to have forwarded the cheque to the handwriting expert. He also submitted that the Ld.Sessions Judge has committed error in not allowing the revision and therefore the petitioner approached this court. Mr.Baqui has relied upon the decisions of the Kerala High Court in the matter of **Sreedhar Pillay and others vs P.J.Alexander and another** reported in **1992 CRI.L.J.3433**, in the matter of **Kuruvilla vs Sivarama Pillai** reported in **1996(4) Crimes 522** the decision of Rajasthan High Court in the matter of **Azhar Beg vs State of Rajasthan** reported in **1997 CRI.L.J.481**, the decisions of Andhra Pradesh High Court in the matter of **Shri Taher N.Kambhati vs M/s Vinayak Enterprises** reported in **1995 CRI.L.J.560** and in the matter of **A.Bhoosanrao vs Purshottamdas** reported in **1998 CRI.L.J.906** for contending that the accused can

examine his own witness for supporting the defence and therefore he submitted that this court may interfere at this stage.

6. On behalf of the respondent-complaint Mr.Ahuja, the Ld.advocate for the complainant submitted that as per the provisions of Negotiable Instruments Act once the signature is admitted there is a presumption regarding the contents of the cheque which would include the name, date and the amount and therefore he submitted that mere denial or raising the defence is not sufficient, but there must be sufficient case made out for such purpose and then only presumption can be rebutted. Mr.Ahuja submitted that an application is made for the purpose delaying the proceedings of the complaint and since much time is passed the cheque was not sent to the handwriting expert and therefore he submitted that this court may not interfere. On the question of presumption and contents of the cheque, Mr.Ahuja has relied upon the decision of the Apex Court in the matter of K.Bhaskaran vs Sankaran Vaidhyan Balan and another reported in AIR 1999 SC 376 and in the matter of Jagat Ram vs Hawa Singh reported in 2001(6) Supreme 585.

7. Mr.Gohil has supported the orders passed by both the

courts below.

8. Having considered the above, it appears that as such the order passed by the Ld.Magistrate can be said as a discretionary order and the Ld.Sessions Judge in revisional jurisdiction has also considered the matter and has found that there is no case for interference. In normal circumstances when the discretionary order is passed and unless it is demonstrated that the discretion is ex facie perverse or is resulting into causing great injustice to the parties, this court may interfere in exercise of its powers under Article 227 of the Constitution of India. If the matter is examined in the light of the same, it appears that as per law the accused has right to lead evidence for supporting the defence in the proceedings under section 138 of Negotiable Instruments Act. The presumption of law in respect of the contents of the cheque can be rebutted by leading cogent evidence for such purpose. If during the course of hearing the court finds that it is necessary to forward the cheque to the handwriting expert, it may do so, but without there being any supporting evidence for such purpose led by the accused it can not be asserted by the accused as it is that the cheque may be sent to

the handwriting expert by raising dispute that the cheque was singed blank and the contents are not written by the accused. The Ld.Magistrate has found that the present application is with a view to delay the proceedings and therefore the Ld.Magistrate has rejected the application. It appears that if the right of the accused to lead the evidence including by examining the handwriting expert is foreclosed for all times to come it may seriously prejudice the defence. Therefore the Ld.Magistrate ought to have exercised the discretion by leaving the said stage open after the proper evidence is led by the accused for supporting the defence that the cheques were signed blank and the contents were not written by the accused. As the exercise of discretion by the Ld.Magistrate may result into causing prejudice to the defence, if the order is read for closing the right of leading evidence on behalf of the accused including by examination of handwriting expert it may result into serious prejudice to the defence. Therefore, I find that the order passed by the Ld.Magistrate as well as Ld.Sessions Judge which impugned in this petition deserve to be interfered with to that extent.

9. In view of the above, the order passed by the

Ld.Magistrate and its confirmation thereof by the Ld.Sessions Judge shall stand modified to the effect that after proper evidence is led by the accused that the cheques handed over to the complainant were signed as blank cheques without there being date, name and the amount, the accused may pray to the trial court for examination of hand writing expert as the case may be and if such an application is made at that stage the matter may be considered in accordance with law by the Ld.Magistrate and at that stage the contentions of both sides shall remain open.

It is clarified that if there is no evidence led as observed earlier on behalf of the accused that the cheques were handed over blank, the option for referring the cheques to handwriting expert may not be available to the accused.

10. The present order passed by the Ld.Magistrate as well as the Ld.Sessions Judge shall not be treated as foreclosing the right of the accused for all times to come to refer the cheque to the handwriting expert and/or for examination of the handwriting expert.

11. Both the petitions are allowed to the aforesaid extent. Rule is made absolute accordingly.

24.8.05/murty (JAYANT PATEL,J)